IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SUR TAX REFERENCE No 1 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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COMMISSIONER OF SUR TAX

Versus

SHREE DIGVIJAY WOLLEN MILLS

Appearance:

1. SUR TAX REFERENCE No. 1 of 1989
MR MANISH R BHATT, Sr. Standing Counsel
for Petitioner No. 1
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 03/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

At the instance of the Revenue, the following

question of law is referred for the opinion of this Court:

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal has been right in law in confirming the order of the Commissioner of Income-tax (Appeals) in holding that there was no mistake apparent from record in not excluding the amount of proposed dividend from the general reserve for computation of capital employed and consequently the order u/s. 13 passed by the S.T.O. was without jurisdiction?"

2. The assessment years involved are assessment years 1973-74 and 1974-75. The respondent-company was assessed to surtax. After completion of the original assessments in which the Officer had included the full amount of general reserve at the figure at which it appeared in the balance-sheet, the Officer realised that he should perhaps have looked into the appropriations. On scrutiny he found that the figures of reserves which he had taken into account for computation of capital were inclusive of certain appropriations already made, out of the profits of the relevant Financial Years. In particular, he noticed that the dividends proposed out of those years' profits stood fully embedded in the amounts of general reserves since the profits in their entirety had been straightway transferred to the General Reserve without carving out and showing separately the appropriation made for the proposed dividends. He rectified the orders as if they were mistakes apparent from records u/s. 13.

3. In appeal, the principal attack was not on merits, but on assumption of jurisdiction to rectify the assessments on a point on which there is no mistake which could be said to be apparent from record. Reference was made to the decision of the Supreme Court in T.S. Balram Vs. Volkart Brothers (1971) 82 ITR 50. Reference was also made to the decisions of Bombay High Court in C.I.T. Vs. Indian Smelting and Refining Co.Ltd. (1977) 107 ITR 793.

4. After examining the issue, the first appellate authority held that if there is a mistake at all, it cannot be called glaring and obvious apparent from records as the mistake if any has to be discovered by complicated process of investigation and arguments. The

impugned order was cancelled. In second appeal before the Tribunal the order of First appellate authority was upheld.

5. In the above background of the facts and circumstances, the Revenue has referred the application for the opinion of this Court.

6. Heard Mr. Manish Bhatt, ld. Senior Standing Counsel appearing for the Revenue. Nobody appears on behalf of respondent assessee though the notice was duly served. At the time of hearing of this Reference, our attention is drawn to the decision of the Supreme Court in the case of Karamchand Premchand P.Ltd. vs. Commissioner of Income-tax - (1993) 200 ITR 268. It was submitted by Mr. Bhatt that the controversy raised in the present Reference is duly resolved by the abovereferred decision of the Supreme Court. So far as the jurisdiction under Section 13 of the Sur Tax Act is concerned, the Supreme Court has observed that the appellate order passed by the Appellate Tribunal in a surtax matter without taking note of the Explanation to rule 1 of Schedule II to the Companies (profits) Surtax Act, 1964 could be rectified by the Tribunal and the Tribunal's power flowed from section 13 of the Act. The Supreme Court has further held that the amounts set apart for proposed dividends, profit sharing bonus and pension scheme were not reserves and could not be included in the computation of the capital of the assessee under the provisions of rule 1 to Schedule-II to the Companies (Profits) Surtax Act, 1964. In this context, it is also observed that the amounts set apart for proposed dividend cannot be treated as reserves but as a provision for giving a current liability. Based on these pronouncements of law by the Supreme Court, it is urged before us that the Surtax Officer was justified in passing the order under Sec. 13 of the Surtax Act, wherein he has taken the view that addition of dividend for assessment year 1972-73 of Rs. 7,71,663/= to the General Reserves instead of deducting it is nothing but a clear arithmetical error. The Surtax Officer is also justified in taking the view that deduction of dividend for 1973-74 was also inadvertently done as proposed dividend of 1973-74 was not to be considered while working out the capital base as on 1st day of the accounting period that is 1-4-73 relevant to assessment year 1974-75. Since these were the mistakes done by the Surtax Officer which are in the nature of arithmetical errors the action taken by the Surtax Officer for rectification of the said mistakes by invoking the powers under Section 13 of the Act is held to be justified.

7. Having regard to the facts and circumstances of the case, and having regard to the ratio laid down by the Supreme Court in the abovereferred judgment, we are of the view that the Tribunal was not justified in confirming the order of the CIT (Appeals) in holding that there was no mistake apparent on record in not excluding the amount of proposed dividend in the general reserves for computation of the capital income and consequently the order under Sec. 13 passed by the Surtax Officer is without jurisdiction.

8. We, therefore, answer the above question referred to us in the negative, that is in favour of the Revenue and against the assessee.

9. The Reference is accordingly disposed of with no order as to costs.

[M.S. Shah, J.]

rmr. [K.A. Puj, J.]